No. 87-5765

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

---

KEVIN N. STANFORD,

*Petitioner,*

v.

COMMONWEALTH OF KENTUCKY,

*Respondent.*

---

**On Writ Of Certiorari To The Supreme Court Of Kentucky**

---

## REPLY BRIEF FOR PETITIONER

---

J. DAVID NIEHAUS
Deputy Appellate Defender
Co-Counsel for Petitioner

DANIEL T. GOYETTE
Jefferson District
Public Defender
*Of Counsel*

FRANK W. HEFT, JR.*
Chief Appellate Defender
Jefferson District Public
Defender's Office
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 625-3800
*Counsel for Petitioner*
**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES



## PREFACE

The purpose of this brief is to demonstrate that the manner in which the respondent has concluded that there is a consensus in this country which favors capital punishment of juveniles is misleading and is not supported by a reasonable examination of available data.

Similarly, this brief will refute the respondent's position that setting a minimum age of 18 for the imposition of capital punishment is impermissibly arbitrary. The respondent's position not only ignores the fact that age barriers are routinely erected by society because of the fundamental differences between juveniles and adults, but also fails to consider valid, objective criteria by which "evolving standards of decency" are determined. *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958).

Kentucky did not prescribe a minimum age for the imposition of capital punishment at the time of the offense for which the petitioner was convicted. Consequently, this brief will also address the respondent's attempt to escape the impact of *Thompson* v. *Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988).

Lastly, this brief will refute the respondent's assertion that Part D of the petitioner's original brief sets forth arguments which are not fairly encompassed by the question presented. The respondent's brief argues that because certain procedural safeguards exist in capital cases, the imposition of capital punishment on a juvenile who is under the age of 18 at the time of the crime does not violate the Eighth and Fourteenth Amendments. In Part D of his brief, the petitioner demonstrates that the safeguards against arbitrary imposition of the death penalty on a juvenile are, in practice, hollow and meaningless. Therefore, the points made in Part D of the petitioner's brief are fairly presented to the Court because they refute the respondent's argument concerning the existence of adequate due process safeguards in capital cases.

Before commencing his arguments, the petitioner finds it necessary to respond to the respondent's distortion of certain factual matters and its use of the statement of a non-testifying

co-defendant, David Buchanan, as evidence of the petitioner's guilt.

At the outset it should be noted that only Buchanan was convicted of rape. (TE IX, 1347). Indeed, the indictments did not even charge the petitioner with rape and the instructions allowed the petitioner to be convicted of only one count of sodomy. (TR 81CR1218, Vol. I, 1-3; TR 82CR0406, Vol. I, 1-3; Vol. II, 234, 237, 245).

Contrary to the respondent's version of the facts, Buchanan never told Troy Johnson that he and the petitioner had sex with the victim. On direct examination, Johnson was asked the following questions and gave the following answers. (TE VII, 1036-1037):

> Q. 3073 [D]id [Buchanan] tell you what happened while he was over at the Checker Station?
>
> A. Said that he had had sex with her . . .
>
> Q. 3076 Did . . . Buchanan tell you why you were going to the car?
>
> A. To have some more sex with her.

It should also be noted that the prosecution's expert testified that hair comparisons do not constitute a basis for a positive, personal identification. (TE VI, 804-812, 826).

It is axiomatic that the statement of a non-testifying co-defendant does not constitute evidence of another defendant's guilt. *Bruton* v. *United States*, 391 U.S. 123, 125 (1968). Indeed, Buchanan's statement is presumptively unreliable. *Lee* v. *Illinois*, 476 U.S. 530, 539 (1986). Nevertheless, the respondent's brief (pp. 4-5) relies on it as evidence to prove what the petitioner was supposed to have done in the bathroom of the service station.

The "bragging" and "boasting" (Respondent's Brief, p. 6) about the crime could have been just that, an attempt to impress the petitioner's peers and nothing more. Indeed, boasting in front of peers is perhaps the epitome of juvenile behavior and there are any number of reasons unrelated to the



question of guilt why a juvenile might admit to criminal conduct. See e.g. *Crane* v. *Kentucky*, 476 U.S. 683 (1986).

The prosecution's case was based largely on the self-serving statements of two co-defendants, but there is objective and independent evidence that casts substantial doubt on the credibility of Johnson's testimony and Buchanan's statement.

Two women drove upon the crime scene at the moment the shots were fired. Two black men walked past their car and a third man was in a nearby car. Neither of the women identified the petitioner as being either of the men who walked past their car. (TE IX, 954-972, 983-992). The women identified David Buchanan's uncle, Calvin, as being one of the men that passed their car. (TE IV, 536; TE IX, 972, 991).

Johnson testified that the petitioner was supposed to have fired the shots from the driver's side of the victim's car but the position of the victim's body and the location of the gunshot wounds were inconsistent with the testimony that the shots were fired from the driver's side of the car. The victim was found face down in the rear seat of her car. Her head was on the driver's side of the car. (TE III, 400-401; TE IV, 576-579). She sustained a non-fatal gunshot wound to the left side of the mouth and also sustained a lethal wound to the right side of the head. (TE III, 366-368, 372). This evidence supports the conclusion that the first shot fired had to have resulted in the non-fatal wound to the left side of the face. That shot would have caused her head and body to spin to the right and back of the car and be pushed toward the driver's side of the car. Since only one gun was alleged to have been involved and one individual was alleged to have fired the shots, the position of the body indicates that the fatal shot could not have been fired from the driver's side of the car where the petitioner was supposed to have been standing.

Footprints were found in the snow on the driver's and passenger's sides of the victim's car. (TE IV, 580-584; See also photographs Commonwealth's Exhibits 47-1-9 and 48-1-19). Moreover, scientific testing disclosed a positive reaction for firearms residue around the dome light in the center of the

victim's car. (TE VI, 760-761, 770-771). When considered with the position of the victim's body, the evidence is more consistent with the gunshots having been fired by someone leaning in the passenger side of the car.

The evidence, taken as a whole, substantially undercuts the credibility and reliability of Johnson's testimony and Buchanan's statement.

## ARGUMENT

### I. Determining Consensus On Imposition Of Capital Punishment On Juveniles.

Of the 36 states which permit capital punishment, 12 preclude the imposition of the death penalty on a juvenile who was 17 at the time of the crime.[1] From this data, the respondent concludes that there is a national consensus which favors the death penalty for juvenile offenders. (Respondent's Brief, pp. 13-15). This conclusion is totally misleading for several reasons and even if it was true, it would not necessarily establish the constitutionality of capital punishment for juveniles because "no penalty is *per se* constitutional." *Solem* v. *Helm*, 463 U.S. 277, 290 (1983).

---

[1] The respondent suggests in n. 4 of its brief (p. 14) that New Hampshire should not be included among the 12 states which limit capital punishment to persons over the age of 18. New Hampshire law provides, "In no event shall any person under the age of 17 years be culpable of a capital murder." N.H. Rev. Stats. Ann. § 630:1 (1986 Repl., p. 38) *Capital Murder*—§ V. "In no event shall a sentence of death be carried out upon a pregnant woman or a person for an offense committed while a minor." § 630:5 N.H. Rev. Stats. Ann. Procedure in Capital Murder—§ XIII (1988 Cum. Supp., p. 10). The age of majority is 18. N.H. Rev. Stats. Ann. §§ 21-B:1 and 21:44 (1987 Cum. Supp.). A plain reading of the New Hampshire statutes indicates that while a 17 year old may be convicted of a capital murder, he or she cannot be subjected to the death penalty. Therefore, New Hampshire is properly included among the 12 death penalty states which prohibit the execution of juveniles. (See Petitioner's Brief, App. 4).



The respondent's analysis ignores the 14 states and the District of Columbia which prohibit capital punishment. Surely, a national consensus cannot be determined by disregarding those jurisdictions. It is simply illogical to conclude, as does the respondent, that such jurisdictions are "false indicators" in determining a consensus on the issue of the execution of defendants who are juveniles at the time of their crimes.

As data supporting its conclusion, the respondent has inappropriately included 18 states which do not expressly establish a minimum age in their capital punishment statutes. (Respondent's Brief, p. 13, n. 3).[2] However, the plurality and concurring opinions in *Thompson* do not take those states into account in determining whether there is a consensus in favor of the death penalty for juveniles because "they do not focus on the question of where the chronological age line should be drawn"[3] and because it is by no means certain that those states have "deliberately chosen"[4] to permit capital punishment for juveniles who were 17 years old at the time of committing a crime.

Thus, when these 18 states are added to the 12 states which prohibit the death penalty for a juvenile who was 17 at the time of the crime, only six of the 36 death penalty states have specifically authorized the death penalty for juveniles. (See Petitioner's Brief, App. 4 at p. 22a). The laws of six states hardly establish a national consensus.

The respondent's search for a national consensus cannot be advanced by its argument that age alone should not be a factor in treating juveniles differently from adults for punishment purposes because juveniles who are convicted of serious crimes in non-death penalty jurisdictions must face the same punish-

---

[2] The 18 jurisdictions are listed in the plurality opinion in *Thompson*, 106 S.Ct. at 2695, n. 26. Although 19 jurisdictions are listed in n. 26, Vermont can be deleted therefrom because it now prohibits capital punishment. See Title 13, Vt. Stat. Ann. § 2303 (Supp. 1988).

[3] *Thompson* v. *Oklahoma*, 106 S.Ct. at 2695 (plurality opinion).

[4] *Id.* 106 S.Ct. at 2707 (O'Connor, J., concurring).

ment as adult offenders. This argument ignores the principle that "the penalty of death is qualitatively different" from any other sentence. *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). The issue here is not whether juveniles who are convicted of murder should escape punishment, as the respondent's analysis seems to imply, but whether the Eighth and Fourteenth Amendments preclude the imposition of capital punishment on an accused who is under the age of 18 at the time of committing a crime. In light of the difference between the death penalty and other sentences, it is inappropriate for the respondent to analyze the constitutionality of the death penalty for juveniles by relying on the fact that non-death penalty states subject juveniles to the same punishment as adult offenders.

The respondent asserts not only that "there is no legislative consensus against" subjecting 17 year old juveniles to the death penalty, but also that state statutes concerning capital punishment "are the most reliable indicia of modern societal standards pertaining to" the issue before the Court. (Respondent's Brief, p. 19). The respondent presumes that the petitioner can prevail only if he shows, at the very least, that a substantial majority of jurisdictions preclude the imposition of the death penalty on a juvenile who was 17 at the time of the crime. However, neither unanimity nor a "compelling" majority of the laws of the states is constitutionally required to establish a consensus. *Enmund* v. *Florida*, 458 U.S. 782, 793 (1982). Since the respondent can establish that only six states specifically authorize the death penalty for juvenile offenders, the consensus on the issue of a death penalty for juvenile offenders undoubtedly favors the petitioner's position.

Since the respondent considers legislative enactments to be the most important factor in determining the issue presented by this case it has summarily dismissed other criteria necessary to resolve Eighth Amendment issues. In determining whether a particular punishment violates the Eighth Amendment, the Court's "judgment 'should be informed by objective factors to the maximum possible extent.'" *Enmund*, 458 U.S. at 788 quoting *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977)



(plurality opinion). Such factors include "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made . . .". *Enmund*, 458 U.S. at 788. The respondent argues that with the exception of legislation, the criteria used by the *Thompson* plurality in resolving that Eighth Amendment issue are invalid or unreliable. Such a notion was squarely rejected by *Enmund*, 458 U.S. at 788.

Expressing what can only be described as a distorted view of what truly constitutes a democratic society, the respondent concludes that minority views are too much of an "unreliable factor" upon which to base a decision abolishing capital punishment for juveniles because "only the minority would be expected to speak out in opposition" and "[i]f those groups represented the majority view, they would not find it necessary to advocate that the law be changed." (Respondent's Brief, p. 21). A democratic society, as envisioned by the respondent, would undoubtedly suppress the expression of any views contrary to the perceived majority opinion and thereby render the rights of minorities to be purely fictional. For true democracy to flourish, the legal system must vigilantly protect minority rights. See e.g. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). The respondent's argument is particularly surprising in light of the fact that a majority of the jurisdictions in this country prohibit the imposition of capital punishment on a juvenile who was under the age of 18 at the time of the crime.

Equally incredible is the respondent's argument that expression of the international community's overwhelming opposition to the imposition of the death penalty on juveniles can be ignored by the Court in its Eighth Amendment analysis. The respondent reasons, "The untrustworthiness of such cross-national comparison is attributable not only to the substantial differences in culture and heritage, but to the very nature of crime in other countries." (Respondent's Brief, pp. 21-22). In defense of its position, the respondent asserts that the homicide rate in the United States is considerably higher than that of many other countries. (Respondent's Brief, p. 22). Aside

from the fact that the killing of a human being is no different whether it occurs in a foreign country or this country, the respondent's argument completely undercuts and invalidates the deterrence rationale for a juvenile death penalty because its existence in this country has not resulted in a decrease in the homicide rate and its absence in other countries has not contributed to an increase in their homicide rates. [9]

The respondent's rejection of international opinion on the basis of differences in culture and heritage is disturbing in light of the fact that this country began as and continues to be the world's melting pot. Our country is an amalgam of the heritage, cultures, and beliefs brought by the immigrant peoples who settled here. The prohibition against executing juvenile offenders is a bond uniting numerous countries that have little else in common. (See Appendix, A-1—A-7 of *Amicus Curiae* Brief filed by Amnesty International). The substantial diversity among the cultures, political systems, and economic status of the numerous countries that have outlawed capital punishment for juveniles is precisely the reason why it is a reliable factor in determining evolving standards of decency.

## II. Prohibiting Capital Punishment For Juveniles Under The Age Of 18 At The Time Of Committing A Crime.

The thrust of the arguments in Section III of the respondent's brief is that juveniles as a class should not be exempted from capital punishment. The respondent argues that the determination of whether a juvenile should be sentenced to death should be made by considering the accused's background, character and the circumstances of the crime. The respondent adopts this approach because of its view that adequate procedural and substantive safeguards exist which prevent arbitrary imposition of the death penalty. The premises upon which the respondent bases these arguments are substantially flawed.

The respondent urges the Court to reject a "bright line" approach to the resolution of the issue of whether juveniles should be subjected to capital punishment. "The Court should not depart from its longstanding premise that all capital offenders must be given individualized consideration by the sentencer. It is unrealistic to assume that all persons belonging to this age group [juveniles less than 18 years old at the time of their crimes] share the same degree of immaturity." (Respondent's Brief, p. 9). That argument, embodied in Section III of the respondent's brief, ignores not only society's presumption that persons under the age of 18 are immature and do not act as adults and cannot be expected to do so, but also the special treatment society affords juveniles as a class.



As to virtually every aspect of a juvenile's life, society has erected age barriers which are predicated on the presumption of a juvenile's immaturity and irresponsibility. Laws which are enacted by society and which restrict the rights and privileges of juveniles on the basis of age are absolute. They are the embodiment of the well-recognized and readily accepted differences between adults and juveniles.

The respondent is apparently content with such an approach in all aspects of a juvenile's life with the exception of the imposition of capital punishment. By way of example, the right to vote at both the state and federal levels is not determined by an individual's maturity or other personal characteristics. It is determined solely by one's age. All persons under the age of 18 are treated alike and no distinction is made on the basis of socioeconomic or cultural factors or social and intellectual development. The respondent offers no persuasive reasons why all other aspects of a juvenile's life can be governed solely by age and why the issue of whether society should execute a juvenile should be based on individualized consideration in a given case. The bright-line approach taken by society on virtually every other important aspect of a juvenile's life should likewise be utilized in exempting juveniles under the age of 18 from the imposition of capital punishment.

## III. Impact Of *Thompson* v. *Oklahoma*

The respondent concedes that the statute under which the petitioner was transferred to the circuit court for trial as an adult (KRS 208.170) did not specify a minimum age for capital punishment. (Respondent's Brief, p. 24). However, the

respondent concludes that the Kentucky legislature must have considered a minimum age for capital punishment because the transfer statute [KRS 208.170(1)] permitted a juvenile who was under the age of 16 to be transferred to circuit court for trial as an adult if reasonable cause was found to believe that the child had committed a Class A Felony or a capital offense. The respondent finds this legislative consideration in the plain language of KRS 208.170. (Respondent's Brief, pp. 25-26). What the respondent ignores is that the plain language of the statute undoubtedly permits a 10 or 12 year old juvenile to face the death penalty. In light of *Thompson* v. *Oklahoma*, it is difficult to believe that such "consideration" by a state legislature would enable the statute to pass constitutional muster under the Eighth and Fourteenth Amendments.

Simply because the Kentucky legislature clarified its position on a minimum age for capital punishment by enacting KRS 640.040 in 1987, it does not follow, as the respondent suggests, that *any* consideration was given to setting a minimum age for the imposition of capital punishment in 1981 pursuant to KRS 208.170 which was in effect at the time of the crime for which the petitioner was convicted. "In the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'" *United States* v. *James*, 478 U.S. 597, 606 (1986) quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "When . . . the terms of a statute [are] unambiguous, judicial inquiry is complete except in 'rare and exceptional circumstances.'" *Rubin* v. *United States*, 449 U.S. 424, 430 (1981) quoting *TVA* v. *Hill*, 437 U.S. 153, 187 n. 33 (1978). As the respondent concedes, KRS 208.170 is unambiguous insofar as it does not set a minimum age for the imposition of capital punishment. In the absence of any other evidence, legislative consideration of a minimum age for capital punishment cannot be divined from the mere fact that subsequent legislation specifically enacted a minimum age for capital punishment or that legislation which would have prohibited imposition of the death penalty on juveniles who were under 18 at the time of the crime was proposed but not enacted. (Respondent's Brief, p. 26).



The respondent asserts that the "[p]etitioner's interpretation of the *Thompson* concurrence would exempt juvenile murderers from *non-capital* punishments as well as from the death penalty." (Respondent's Brief, p. 28. Respondent's emphasis). Such an absurd notion could not be further from the truth and ignores a fundamental precept of Eighth Amendment jurisprudence, i.e. the "qualitative difference" between the death penalty and other punishments. *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978). The petitioner has never suggested that society cannot subject juvenile offenders who commit serious crimes to lenghy terms of imprisonment. Indeed, severe sentences such as life imprisonment or life without parole are the obvious means by which society can protect itself from dangerous juvenile offenders and obtain a measure of retribution without putting the juvenile to death.

## IV. Existence Of Safeguards Against Arbitrary Imposition Of Capital Punishment

On pp. 31-35 of its brief, the respondent argues that there is no need to automatically exempt juveniles from the death penalty because of numerous procedural safeguards that protect them against the arbitrary imposition of capital punishment. As examples of these safeguards the respondent cites procedures required by due process in juvenile court prior to a transfer decision and the use of mitigating evidence including the age of the accused. The respondent likewise identifies the proportionality review conducted by the Kentucky Supreme Court and a jury instruction on the petitioner's youth as further safeguards. (Respondent's Brief, p. 35). Finally, the respondent notes that the statute under which the juvenile court transferred jurisdiction of the petitioner's case to the circuit court (KRS 208.170), provided for grand jury reconsideration of the juvenile judge's transfer decision and also provided the circuit judge with the option of considering the transfer and returning the juvenile to district court for trial. (See KRS 208.170(5)(a) and (b); App. 1a, p. 2a of Petitioner's Brief).[5]

---

[5] The respondent, however, has ignored the fact that these "safeguards" have been eliminated by Kentucky's present transfer statute (KRS 640.040).

The respondent recognizes the constitutional requirement that the accused be permitted to introduce mitigating evidence in the sentencing phase of a capital trial and the importance that youth has as a mitigating factor. However, the respondent has failed to refute the petitioner's arguments that he was denied the opportunity to fully present mitigating evidence, i.e., Robert Jones' testimony, and that youth and age are hollow safeguards because both concepts operate on a sliding scale which encompasses a wide range of chronological ages and therefore do little, if anything, to protect juveniles. Similarly, the respondent has not rebutted the petitioner's argument that the proportionality review conducted by the Kentucky Supreme Court is constitutionally inadequate because the petitioner's case was compared only to adults who received the death penalty and was also compared to one juvenile case in which the defendant's conviction and sentence were reversed. (See Petitioner's Brief, p. 40).[6]

The respondent's argument that juveniles who are under 18 at the time of committing a crime should be subjected to capital punishment is premised on the existence of the aforementioned procedural safeguards which the respondent perceives as being sufficient to prevent the arbitrary imposition of the death penalty. Yet, pointing to Section D of the petitioner's brief, the respondent argues that the petitioner has raised matters which cannot be fairly included in the question on which certiorari was granted. (Respondent's Brief, pp. 2-3). Section D, like Sections C and E of the petitioner's brief, simply demonstrates that these so-called safeguards are more illusory than real and

[6] Throughout its brief, the respondent frames its arguments from the perspective that the petitioner is a young adult. Thus, the premise underlying the respondent's arguments is fundamentally flawed because our society and its laws recognize the petitioner to be a juvenile and not a young adult. For nearly all intents and purposes, society has set 18 as the boundary between childhood and adulthood. We live on either side of that boundary. A person is either a juvenile or an adult. There is no middle ground. Therefore, the focus of the respondent's argument is completely misdirected and is totally inconsistent with a fundamental precept of our society.



are meaningless because they do not eliminate the arbitrary imposition of capital punishment on a juvenile. Thus, Section D of the petitioner's brief does not exceed the fair parameters of the constitutional question presented by this case and addresses issues necessary for the proper disposition of the case. *Batson* v. *Kentucky*, 476 U.S. 79, 109-111 (1986) (Stevens, J., concurring). Where resolution of a particular question of law is a "predicate to an intelligent resolution" of the issue on which certiorari was granted and the parties have briefed that question of law, the Court must address it. *Vance* v. *Terrazas*, 444 U.S. 252, 258-259 n. 5 (1980) and *Cuyler* v. *Sullivan*, 446 U.S. 335, 343 n. 6 (1980). Issues which are "essential to analysis" of the question presented or "essential to [its] correct disposition" are "fairly comprised" by said question and therefore may be considered by the Court. *Procunier* v. *Navarett*, 434 U.S. 555, 559 n. 6 (1978); *United States* v. *Mendenhall*, 446 U.S. 544, 551 n. 5 (1980). See also *Eddings* v. *Oklahoma*, 455 U.S. 104, 114 n. 9 (1982) in which the Court held that the question of whether imposition of the death penalty was excessive comprised "the argument that the sentencer erred in refusing to consider relevant mitigating circumstances" during the sentencing hearing. These principles fully justify the inclusion of Sections C, D, and E in the petitioner's brief.

## CONCLUSION

The arguments made by the respondent neither dissipate the strength of the arguments presented in the petitioner's brief nor justify affirmance of the decision of the Kentucky Supreme Court. Accordingly, the petitioner, Kevin N. Stanford, respectfully urges the Court to rule that the imposition of the death penalty on a juvenile who was under 18 years of age at the time of committing a crime violates the Eighth and Fourteenth Amendments to the United States Constitution.

Respectfully, submitted,

FRANK W. HEFT, JR.*
Chief Appellate Defender
Jefferson District Public
Defender's Office
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 625-3800
*Counsel for Petitioner*
**Counsel of Record*

J. DAVID NIEHAUS
Deputy Appellate Defender
Co-Counsel for Petitioner

DANIEL T. GOYETTE
Jefferson District
Public Defender
*Of Counsel*